United Nations

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/890
7 August 1998

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 890

Case No. 980: AUGUSTINE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Chittharanjan Felix Amerasinghe; Mr. Kevin Haugh;

Whereas, on 13 June 1997, Gerald Augustine, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), filed an application requesting the Tribunal, inter alia:

"1. [To] dismiss all charges against [him] ...

2. [To] reinstate [him in his] original position at UNICEF;

2[sic] [To pay him] full back pay ... in the interim;

... Or

4. In the alternative, [to] order a full and impartial investigation and hearing of all issues pertaining to [his] dismissal from UNICEF.

..."

Whereas the Respondent filed his answer on 16 September 1997;

Whereas the Applicant filed an additional document on 29 June 1998;

Whereas, on 2 July 1998, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 17 June 1991, on a three-month short-term appointment, at the G-3 level, in the Accounts Section. The appointment was extended through 16 December 1991. On 17 January 1992, the Applicant was granted a six-month fixed-term appointment in the Accounts Section, Division of Financial Management (DFM). The Applicant continued on a series of temporary and fixed-term appointments through 28 February 1995. On 17 April 1995, he re-entered the service of UNICEF as a Data Processing Clerk, at the G-3 level, and served on successive fixed-term contracts through 16 March 1996. He re-entered the service on 17 April 1996, as an Accounting Clerk, and on 24 June 1996, he received a fixed-term appointment of 21 months and 24 days as Accounts Clerk, DFM, at the G-4 level. On 1 September 1996, the Applicant was suspended with pay. On 18 September 1996, he was suspended without pay with effect from 25 September 1996. On 15 November 1996, the Applicant was summarily dismissed.

On 30 August 1996, the Deputy Executive Director informed the Applicant as follows:

> "It has come to our attention that you have utilized a telephone authorization code belonging to another staff member incurring charges in this one instance in the amount of $125.00.
>
> In light of the above, the Executive Director has decided, in the interest of the Organization, that further enquiries should be made and that in the meantime you be placed on suspension with full pay from the date of receipt of this letter so that there is no possibility of any interference on your part, intentional or unintentional, with these enquiries. ...

...

I should emphasize that this suspension does not constitute a disciplinary measure. ..."

On 18 September 1996, the Director, Division of Human Resources (DHR), informed the Applicant that UNICEF's review of the Applicant's misuse of telephone authorization codes had revealed (1) that the Applicant had used a staff member's code without her knowledge or agreement, which he admitted only after being confronted, and (2) that he had also used other codes not belonging to him. The Director, DHR, further informed the Applicant that he was being charged with the "unauthorized use of UNICEF telephone codes for personal reasons" and that his suspension with pay was being converted to a suspension without pay. The Applicant was also given a copy of a statement written by the staff member whose code the Applicant had admitted using, and a printout of the telephone calls made using that staff member's code.

On 2 October, 28 October and 29 October 1996, respectively, the Applicant sent letters to the Director, DHR, responding to the charges of misconduct made against him. The Applicant asserted, among other things, that the authorization code had been given to him by a former UNICEF staff member, whom he thought to be the "owner" of the authorization code and whom he paid in cash whenever she told him the cost of his calls; that he had investigated some of the numbers listed on the printout and found that the calls had not been made by him; and that only three of the calls listed on the printout had been made by him. He further claimed that the only reason that he had given US$125 to the staff member whose authorization code he had used, which covered the cost of *all* of the unauthorized calls listed, was that he had assumed the other calls had been made by the other staff member who had given him the code to use, and he had expected to recover the cost of those other calls from her. He also stated that he had been unaware that it was an offense to make an arrangement with the "owner" of an authorization code.

On 15 November 1996, the Deputy Executive Director informed the Applicant that after a consideration of all the evidence, including the Applicant's replies to the charges,

> "[t]he Executive Director has thus concluded that your unauthorized use of an authorization code demonstrates serious misconduct and a violation of the highest standards of integrity required for international civil servants as set forth in Article 101 of the United Nations Charter and staff regulation 1.4. In addition, she has concluded that the seriousness of your misconduct warrants immediate separation from service with UNICEF in accordance with staff regulation 10.2. Your summary dismissal shall take place with immediate effect. In accordance with United Nations Staff Rules and Staff Regulations, you shall not be given pay in lieu of notice and you shall not be paid termination indemnity. Since it has taken longer than anticipated to finalize your case, we have decided to reconvert your suspension without pay to suspension with pay up until the effective date of your summary dismissal, 15 November 1996."

On 14 January 1997, the Applicant requested a review of the decision to summarily dismiss him. By letter dated 5 March 1997, the Director, DHR, notified the Applicant that his request for review had been forwarded to an *ad hoc* Joint Disciplinary Committee (JDC). On 3 April 1997, the JDC adopted its report and recommended in relevant part:

> "The [Joint Disciplinary] Committee was unanimous that the organization has presented a strong case against this staff member and that he has not presented evidence to warrant a reconsideration of the action taken to terminate his employment with UNICEF. We, therefore, concur with the decision of the Executive Director."

On 7 April 1997, the Deputy Executive Director informed the Applicant as follows:

> "We have carefully reviewed the report of the *ad hoc* Joint Disciplinary Committee, copy attached, which was constituted at your request to review the decision that you be summarily dismissed.
>
> After having examined your case in light of the Committee's report, the Executive Director has decided to accept its recommendation that no further review

of this case is warranted. Your summary dismissal is hereby maintained ..."

On 13 June 1997, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision to separate the Applicant from service was based on erroneous facts. The Respondent failed to carry out a proper or sufficient investigation into the 247 calls that were improperly made using the authorization codes.

2. The Respondent's decision to dismiss the Applicant constituted unequal and unfair treatment because many others who used the authorization codes illegally had not been disciplined or dismissed.

3. The Applicant's summary dismissal was based on bias and unfairness.

4. The Applicant's due process rights were violated. The Respondent failed to inform the Applicant, at the time he suspended him, of the probable duration of such suspension. Nor did the Respondent notify him of the outcome of the investigation into his alleged misconduct within five days, as he was required to do.

Whereas the Respondent's principal contentions are:

1. The Respondent has broad discretion regarding disciplinary matters, including determining what constitutes misconduct warranting dismissal. The Respondent's decision to dismiss the Applicant was a valid exercise of that discretionary authority.

2. The Respondent's decision was not vitiated by mistake of fact.

3. The Respondent's decision was not vitiated by bias or prejudice. Having offered no evidence of bias or prejudice, the Applicant failed to meet his burden of proof.

4. There was no lack of due process.

The Tribunal, having deliberated from 2 July to 7 August 1998, now pronounces the following judgement.

I. The case arises from the summary dismissal for serious misconduct of the Applicant because he had made personal long distance calls on the account of UNICEF by his unauthorized use of a code belonging to another staff member. Thus, the case concerns the imposition of disciplinary measures.

The taking of disciplinary measures involves the exercise of a discretion by the Administration. It is also the exercise of a quasi-judicial power. In disciplinary cases the Tribunal examines (i) whether the established facts legally amount to serious misconduct or misconduct, (ii) whether there has been substantive irregularity in general, (iii) whether there has been any procedural irregularity, (iv) whether there was an improper motive or abuse of purpose in the imposition of the sanction, (v) whether the sanction is legally provided for, and (vi) whether there was an abuse of discretion in imposing a sanction disproportionate to the offence.

II. The issues in this case are:

(i) Whether the facts establish serious misconduct;

(ii) Whether there was prejudice or discrimination against the Applicant;

(iii) Whether there were any material procedural irregularities; and

(iv) Whether the sanction of summary dismissal was proportionate to the misconduct found to exist.

III. On the first issue, there is no dispute that the Applicant had used a telephone authorization code for long-distance calls belonging to another staff member, without her agreement or knowledge, thereby causing the Administration to incur charges for the Applicant's personal long-distance calls. There can be no question that the unauthorized use

of another staff member's authorization code, prohibited by the rules of the Organization, amounts to misconduct, even though the staff member may not have been aware of the rule. According to the record, the Applicant, when first challenged, denied all knowledge of any unauthorized use of the code. Later, he admitted that he made a number of calls using the unauthorized code, without the agreement or knowledge of the rightful owner, but he refused to disclose at that time how he had obtained the code.

The Tribunal finds that there was sufficient evidence before the JDC to allow the JDC to conclude that the offence committed constituted serious misconduct. The JDC had sufficient grounds for finding incredible the Applicant's defense that he believed the code belonged to a third staff member, who had given it to him, and that he had paid her cash for these calls after they were billed to her and drawn to his attention. Although given the opportunity to provide the JDC with evidence that the alleged arrangement ever existed or that he made any payments to the third staff member, the Applicant produced no such evidence.

IV. On the second issue of bias and discrimination, the Applicant points to the fact that similar violations by other staff members had not been investigated. He also points to the manner in which he was suspended. The Tribunal is of the view that neither factor is evidence of bias or discrimination. The former allegation, particularly because the Administration was unaware of any such abuse, is certainly inadequate by itself to establish such bias or discrimination. Further, the manner in which the Applicant was treated, after the discovery of what was later found to be serious misconduct, including the suspension and the manner of his suspension, is not a basis for concluding that he was discriminated against.

V. Thirdly, the Applicant points to certain conduct on the part of the Administration which, he alleges, amounted to a denial of due process. For example, he states that no probable term was specified in his notice of suspension in violation of the relevant staff rule

110.2(a). The Tribunal finds that because the staff rule states also that suspension should normally not exceed three months, the Applicant could have expected his suspension not to exceed three months. In fact, the Applicant was separated from service within 2 ½ months of his being placed on suspension. There was, thus, no material procedural irregularity in the Administration's failure in this matter. There is also no evidence of any other material procedural irregularity.

VI. Finally, the Tribunal concludes that, in the circumstances, the unauthorized use of the code, coupled with the Applicant's knowledge that the code did not belong to him, and his lack of forthrightness, constituted serious misconduct. Accordingly, the sanction of summary dismissal is not disproportionate to the misconduct committed.

VII. For the foregoing reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Mayer GABAY
Vice-President, presiding

Chittharanjan Felix AMERASINGHE
Member

Kevin HAUGH
Member

Geneva, 7 August 1998

R. Maria VICIEN MILBURN
Executive Secretary

United Nations

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/891
7 August 1998

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 891

Case No. 995: PARKER

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay, Vice-President; Mr. Kevin Haugh;

Whereas at the request of William John Parker, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 30 September 1997 and 31 January 1998, the time-limit for the filing of an application with the Tribunal;

Whereas, on 18 December 1997, the Applicant filed an application requesting the Tribunal, inter alia:

"...

c. To uphold the recommendation of the Joint Appeals Board made on 10 December 1996 (...);

d. ... to order payment to the Applicant with effect from 1 January 1995 of all the emoluments and benefits due to him if promotion to P-4 had been effective on that date, including increased pension provision."

Whereas the Respondent filed his answer on 12 March 1998;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 28 May 1978, on a short-term appointment for thirteen days, as a Verbatim Reporter, at the TR II NL level, with the then Department of Conference Services, now Office of Conference and Support Services (OCSS). Thereafter, he served on a series of short-term appointments, until 5 June 1983, when he was granted a probationary appointment, as a Verbatim Reporter, at the P-3 level. On 1 June 1985, his appointment was converted to permanent. On 1 November 1994, the Applicant was promoted to the P-4 level. On 30 June 1996, he retired from the Organization.

On 15 November 1993, a new placement and promotion system was adopted under ST/AI/390, providing, in part, as follows: "In the case of promotions, the earliest possible date for the implementation of such a promotion will be the first of the month following the decision of the Secretary-General to promote, subject to the availability of a post."

On 1 January 1994, the Applicant was assigned to perform functions at the P-4 level as Verbatim Reporter in OCSS. On 19 January 1994, a P-4 post was advertised for internal recruitment through Vacancy Announcement No. 94-T-OCS-208-NY. The Applicant was the only candidate to apply for the post.

By memorandum dated 16 March 1994, the Director of Personnel informed all heads of departments and offices, as follows:

> "... You will recall that transitional cases were to be submitted without delay, with the collaterals considered, to the Appointment and Promotion bodies, in order to proceed with full implementation of the new Placement and Promotion System.
>
> As four months have passed since the Placement and Promotion System became effective, OHRM [Office of Human Resources and Management] and the Appointment and Promotion bodies will not be able to consider any transitional cases received after 31 March 1994."

On 29 April 1994, a Departmental Review Panel was established, which, on 3 August 1994, recommended the Applicant for the post. On 8 September 1994, this recommendation was presented to the Appointment and Promotion Committee and accepted by that body on 27 October 1994. On 1 November 1994, the Assistant Secretary-General for Human Resources Management, on behalf of the Secretary-General, approved the recommendation. The Applicant was promoted to the P-4 level, with effect from 1 November 1994.

In a memorandum dated 17 November 1994, the Director of OCSS requested the Director, Recruitment and Placement Division, OHRM, to authorize, among other things, a retroactive implementation of the Applicant's promotion to 1 January 1994, the date that the Applicant assumed the functions of his P-4 post. In a reply dated 28 November 1994, the Director, Recruitment and Placement Division, OHRM, informed the Director of OCSS that he was unable to approve his request, stating in relevant part:

> "[T]he policy contained in ST/AI/390, which specifically provides that promotions will be implemented as of the first of the month following the date of approval on behalf of the Secretary-General, has been strictly implemented since November 1993. To change such policy retroactively in favour of OCSS staff members would lead to serious difficulties and would imply re-opening all previous cases since November 1993."

On 5 June 1995, in response to a request from the Executive Office of OCSS dated 19 April 1995, OHRM approved a special post allowance for the Applicant for a period of seven months, with retroactive effect from 1 April 1994 through 31 October 1994.

On 15 March 1995, the Applicant requested the Secretary-General to review the administrative decision not to implement his promotion retroactively to 1 January 1994. On 23 June 1995, he lodged an appeal with the Joint Appeals Board (JAB).

The JAB adopted its report on 10 December 1996. Its considerations, conclusions and recommendations read, in part, as follows:

"Considerations

...

24. The Panel was of the view that OHRM should have entertained the request of the Director for Conference Services, for by denying the request, the Appellant has been unfairly treated.

25. The Panel noted that the Appellant, in paragraph four of his letter to the Secretary-General dated 15 March 1995 requesting a review of the administrative decision not to implement his promotion from the P-3 to the P-4 level effective 1 January 1994, had stated:

> 'The current interpretation of [ST/AI/309, para. 19], creates an injustice, as demonstrated by the promotion of another staff member in the Verbatim Reporting Section, who was placed against a P-4 post on 1 November, who was promoted on 1 November, as I was, and whose promotion was made effective on 1 November, as in my case, while I had been encumbering a P-4 post for ten months.'

The Panel noted that the Respondent has not denied the factual accuracy of paragraph four of the Appellant's letter to the Secretary-General, which depicts unfair treatment.

26. The Panel noted, also, that the Respondent has not denied that prior to the issuance of ST/AI/390 on 15 November 1993 by the Under-Secretary-General for Administration and Management, the prevailing practice was that, subject to satisfactory performance, the promotion of someone already encumbering a higher-level post was made retroactive to the date on which he or she first encumbered that post.

27. The Panel determined that the intent of ST/AI/390, para. 19, was surely based on the expectation that the appropriate bodies would meet regularly and act expeditiously. This surely was not true in the Appellant's case, for which he is not to blame, where: (i) although the deadline for submission of applications was 9 February 1994, the Departmental Review Panel was not established until 29 April 1994; (ii) the Departmental Review Panel delayed for more than three months before meeting on 3 August 1994 to review the Appellant's application; (iii) the Department delayed for more than a month, following the Department[al] Review Panel's recommendation, before making its recommendation to the APC; and (iv) the APC delayed for almost two months before making its recommendation of the Appellant for the post.

28. The Panel was of the view, and agreed with the Appellant, that a staff member should not have to suffer because of difficulties experienced by the Administration in putting into place a new system whose intricacy has not be worked out over several months, thus penalizing a staff member already performing duties at a higher level whose promotion happens to be recommended during the changeover period.

Conclusions and Recommendations

29. Based on the foregoing, the Panel unanimously agreed that the Appellant was unfairly treated by the Respondent's decision to implement the Appellant's promotion from the P-3 to the P-4 level effective 1 November 1994, instead of 1 January 1994 when the Appellant assumed the higher-level functions at the P-4 level, and that the decision was inconsistent with the spirit and intent of ST/AI/390.

30. The Panel unanimously recommends that the Appellant's appointment [sic] from the P-3 to the P-4 level be made effective 1 January 1994, when the Appellant assumed the higher-level functions at the P-4 level."

On 12 March 1997, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

"The Secretary-General does not share the view of the Board that the decision to implement your promotion effective 1 November 1994 was unfair and inconsistent with ST/AI/390. The policy stipulated in paragraph 19 of the Administrative Instruction regarding the earliest possible date for the implementation of a promotion was fully respected in your case. The Secretary-General has inquired further into the matter and has been informed that there was no differential treatment in favour of another staff member in your Department who was also promoted effective 1 November 1994. In fact that staff member was promoted at the same time as she undertook her functions because she was selected for the higher post over another candidate who had been supported by the Department and who had been carrying out the higher functions until then. Although there was some delay in the processing of your case due to the novelty of the system established under ST/AI/390, you were compensated for carrying out those higher functions by receiving a Special Post Allowance. For these reasons, the Secretary-General has decided not to accept the Board's recommendation and to take no further action in respect of your case."

On 18 December 1997, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contention is:

The Applicant's promotion should have been granted with retroactive effect from 1 January 1994, when he first assumed the functions of his higher-level post.

Whereas the Respondent's principal contentions are:

1. The Applicant has no right to promotion, let alone to a promotion at a specific time.

2. The effective date of the Applicant's promotion was determined in accordance with the promotion procedure applicable at the time.

3. There is no evidence that the decision to implement the Applicant's promotion as of 1 November 1994 resulted in unfair treatment.

The Tribunal, having deliberated from 7 July to 7 August 1998, now pronounces the following judgement:

I. The Applicant appeals from a decision by the Secretary-General, dated 12 March 1997, whereby the Secretary-General rejected the Joint Appeals Board's (JAB) recommendation and maintained his decision to promote the Applicant to the P-4 level, with effect from 1 November 1994.

II. The Applicant requests the Tribunal to order the Respondent to accept the recommendation of the JAB and to implement the Applicant's promotion with retroactive effect from 1 January 1994, when he assumed the higher level functions at the P-4 level. In

addition, he seeks payment of all the emoluments and benefits to which he would thereby be entitled, including increased pension benefits, calculated on the basis of the retroactive promotion.

III. The Tribunal must determine whether the Applicant's rights were violated when his promotion was implemented with effect from 1 November 1994 instead of 1 January 1994.

In its report dated 10 December 1996, the JAB concluded as follows:

> "... the Panel unanimously agreed that the Appellant was unfairly treated by the Respondent's decision to implement the Appellant's promotion from the P-3 to the P-4 level effective 1 November 1994, instead of 1 January 1994 when the Appellant assumed the higher-level functions at the P-4 level, and that the decision was inconsistent with the spirit and intent of ST/AI/390."

Administrative instruction ST/AI/390 provides that:

> "19. In the case of promotions, the earliest possible date for the implementation of such promotion will be the first of the month following the decision of the Secretary-General to promote, subject to the availability of a post."

The new placement and promotion system set forth in ST/AI/390 came into effect on 15 November 1993. Information circular ST/IC/1993/66 on Placement and Promotion dated 2 December 1993, which was issued in connection with ST/AI/390, provides that:

> "14. For posts which became vacant during the transitional period, i.e. from 1 July 1993 to 15 November 1993, or before, cases should be presented to the appropriate appointment and promotion bodies without delay, together with the list of collaterals considered. ..."

IV. The Applicant's post became vacant on 1 January 1994, when the staff member who previously encumbered the post retired from the Organization. It is clear that the

transitional period applied to posts which had become vacant from 1 July 1993 to 15 November 1993 or before. The Applicant claims, however, that the transitional period was extended by the Director of Personnel in a memorandum dated 16 March 1994. The Tribunal finds, however, that this memorandum did not change the definition of transitional cases; it only extended the deadline for submission of such cases to the Office of Human Resources and Management (OHRM) and the appointment and promotion bodies until 31 March 1994. In the view of the Tribunal, the Applicant's promotion was not a transitional case since it did not fall within the time period in question. Accordingly, the provisions of administrative instruction ST/AI/390 apply to his case.

V. Staff rule 103.11(a) requires that staff members "assume temporarily, as a normal part of their customary work ... duties and responsibilities of higher level posts".

As compensation for such work, staff rule 103.11(b) provides that:

> "... a staff member who is called upon to assume the full duties and responsibilities of a post at a clearly recognizable higher level than his or her own for a temporary period exceeding three months may, in exceptional cases, be granted a non-pensionable special post allowance from the beginning of the fourth month of service at the higher level."

The Applicant did in fact receive such a special post allowance (SPA) commencing 1 April 1994, through 31 October 1994.

VI. The Applicant is asking the Tribunal to order that his promotion be implemented with effect from 1 January 1994, the date on which he assumed the higher level functions. During the JAB proceedings the Applicant pointed to a certain staff member of the Office

of Conference and Support Services, who was promoted to a P-4 post on the same day that she assumed the functions of that post. The JAB found that the Applicant was treated unfairly, because he had been assuming the functions of his new P-4 post for ten months prior to his promotion, whereas the other staff member assumed the functions of her P-4 post on the same day that she was promoted. The Under-Secretary-General for Administration and Management explained in his letter of 12 March 1997:

> "... The Secretary-General has inquired further into the matter and has been informed that there was no differential treatment in favour of another staff member in your Department who was also promoted effective 1 November 1994. In fact that staff member was promoted at the same time as she undertook her functions because she was selected for the higher post over another candidate who had been supported by the Department and who had been carrying out the higher functions until then. ..."

The Applicant now argues that the matter of the other staff member "relates to an administrative injustice that could and should have been righted by administrative action" but that the "Applicant referred to the promotion of the other staff member merely to give an example of the scale of that injustice ..." The Tribunal, however, does not find that any such injustice was committed in this case through the Respondent's implementation of the new promotion policy.

VII. The Tribunal is satisfied that the Respondent was guided by considerations of equal treatment and consistent application of the promotion procedure. In addition, the Tribunal considers that even though there may have been some delay in processing the Applicant's case due to the novelty of the system, the Respondent properly compensated the Applicant for his having performed the functions of the higher post by granting him an SPA.

VIII. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Vice-President

Kevin HAUGH
Member

Geneva, 7 August 1998

R. Maria VICIEN MILBURN
Executive Secretary

United Nations

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/892
7 August 1998

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 892

Case No. 940: SITNIKOVA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay, Vice-President; Mr. Victor Yenyi Olungu;

Whereas, on 22 August 1996, Iouliia Sitnikova, a staff member of the United Nations Social and Economic Commission for Asia and the Pacific (hereinafter referred to as ESCAP), filed an application requesting the Tribunal, inter alia:

"...

[i] ... to rescind GSCARC's decision declaring the appeal non-receivable ...

[ii] [To order the Respondent] to provide the Applicant with the complete text of CCS' [Compensation and Classification Service] initial classification of her post -- in particular, CCS' point matrix ratings/benchmark calculations. ...

[iii] ... to rescind the decision to classify the post encumbered by the Applicant at the GS-4 level ..."

Whereas, on 7 August 1997, the Tribunal informed the parties that it would defer consideration of the case until the Secretary-General's receipt of the findings of the Bangkok General Service Classification Appeals and Review Committee (GSCARC) on the

classification of the Applicant's post, and requested that the Respondent ensure that those procedures be completed by 31 October 1997;

Whereas, on 30 October 1997, the Respondent transmitted to the Tribunal a copy of the GSCARC report, dated 29 October 1997;

Whereas, on 30 June 1998, the Tribunal requested the Respondent to provide an answer on the merits;

Whereas the Respondent filed his answer on the merits on 9 July 1998;

Whereas the Applicant filed written observations on 13 July 1998, which referred to additional pleas, requesting the Tribunal further to find:

> "...
>
> [a] ... [T]hat sufficient grounds exist for considering [the] first decision [of 14 May 1996] null and void or, at least, for ruling that such decision has been de facto nullified and replaced by the decision dated 29 October 1997, which was communicated to the Tribunal on 30 October 1997;
>
> [b] That by proceeding as it had, before the Applicant could address the Tribunal, the Administration ... failed to follow proper procedures;
>
> [c] That even after the Applicant had submitted her application, the Administration (and subsequently, the Respondent), allowed the administrative procedures to be unduly drawn out, waiting more than a year before following the Office of Legal Affairs' very specific instructions to resubmit the case to GSCARC, and waiting until just one day before the deadline set by the Tribunal to communicate the decision of the Executive Secretary of ESCAP concerning the Classification of the Applicant's post.
>
> ..."

Whereas the facts in the case are as follows:

The Applicant entered the service of ESCAP in Bangkok, Thailand, on 3 January 1992, on a two-year fixed term appointment as a Typist, at the GS-7 level. On 3 January 1994, her appointment was extended for eight months and her grade level changed to GS-5

due to the replacement of the nine-level grading system by a seven-level grading system. The Applicant received further extensions of her appointment. On 1 January 1996, her functional title was changed to Text Processing Clerk. At the time of her application, the Applicant held an appointment at the GS-5, step X level.

On 25 November and 8 December 1994, the Applicant appealed to the Bangkok GSCARC the initial classification decision for her post. On 14 May 1996, the Deputy Executive Secretary, ESCAP, notified the Applicant of GSCARC's recommendation that her appeal was not receivable "since it did not provide additional information as called for by the provisions of the governing administrative instruction [ST/AI/398]". She further informed her that the Executive Secretary, ESCAP, had decided to maintain the classification of her post at the GS-4 level. On 6 June 1996, the Applicant requested the Secretary-General to review that administrative decision. In case the decision were maintained, the Applicant requested the Secretary-General's agreement to submit her case directly to the Tribunal. Not having received a response to her request for review, on 22 August 1996, the Applicant filed the application to the Tribunal referred to earlier.

On 7 August 1997, the Tribunal informed the parties of its decision to defer consideration of the application until the Secretary-General received the recommendation of GSCARC on the merits of the appeal. On 22 October 1997, GSCARC recommended that the initial classification of the Applicant's post should remain at the GS-4 level. On 29 October 1997, GSCARC's recommendation was endorsed by the Executive Secretary of ESCAP.

Whereas the Applicant's principal contentions are:

1. The decision to maintain the initial classification of the Applicant's post at the GS-4 level is erroneous.

2. The Administration violated the Applicant's rights by delays in proceeding with the Applicant's appeal to GSCARC and in notifying the Applicant of the decisions on her appeal. The Applicant is entitled to compensation for these procedural irregularities.

Whereas the Respondent's principal contention is:

The Applicant's appeal against the classification of her post was properly considered by GSCARC which delivered a reasoned recommendation, the acceptance of which did not violate the rights of the Applicant.

The Tribunal, having deliberated from 30 June to 7 August 1998, now pronounces the following judgement:

I. The Applicant initially appealed a decision by the Executive Secretary of the United Nations Social and Economic Commission for Asia and the Pacific (ESCAP) dated 14 May 1996, to maintain the classification of her post at the GS-4 level, in the light of a recommendation by the ESCAP General Service Classification Appeals and Review Committee (GSCARC), that the Applicant´s appeal "was not receivable since it did not provide additional information as called for by the provisions of the governing administrative instruction [ST/AI/398]". On 6 June 1996, the Applicant requested administrative review of this decision, as well as the Secretary-General's agreement to file an appeal directly to the Administrative Tribunal. In the absence of a reply, on 22 August 1996, the Applicant lodged an appeal with the Administrative Tribunal. Following receipt of the application, on 19 September 1996, the Respondent informed the Tribunal that, in view of the fact that this and similar cases were being referred back to GSCARC for a review on the merits, he did not agree to direct submission of the case at this stage to the Tribunal, in the absence of a recommendation by GSCARC. One year later, on 7 August 1997, as no further action had been taken by GSCARC, the Tribunal ordered the Respondent to ensure that GSCARC review the classification of the Applicant's post and complete the classification procedures by 31 October 1997. In its report dated 29 October 1997, GSCARC concluded that "the functions of the post correspond to the classified level of GS-4 level" and recommended "that

the classification decision of 15 September 1994 with respect to the subject post be maintained."

II. In her initial appeal against the classification of her post, by memoranda dated 25 November and 8 December 1994, the Applicant had written to the Acting Executive Secretary of ESCAP, in accordance with ST/AI/398, to lodge an appeal on the grounds that the classification had been inconsistently applied to her case; that it disregarded her career development rights; and that it did not provide any details on the point rating matrix/ benchmark calculations used to classify her post.

In her application to the Tribunal dated 22 August 1996, the Applicant contested the Executive Secretary's decision to maintain the classification of her post at the GS-4 level, based on a recommendation by GSCARC, declaring her appeal not receivable, purely on technical grounds, namely, that she had not provided additional information in accordance with ST/AI/398. She also requested to be allowed to continue the appeals procedure notwithstanding GSCARC's recommendation.

III. Under section 7 of the Statute of the Tribunal:

> "1. An application shall not be receivable unless the person concerned has previously submitted the dispute to the joint appeals body provided for in the staff regulations and the latter has communicated its opinion to the Secretary-General, except where the Secretary-General and the applicant have agreed to submit the application directly to the Administrative Tribunal."

By memoranda dated 19 September, 30 September, 25 November 1996 and 15 January 1997, the Respondent made it clear that he did not agree to the direct submission of the case before the Tribunal. Instead, the Respondent remanded the case back to GSCARC, which is the proper appeals body to hear classification issues. On 7 August 1997, the Tribunal ordered the Respondent to ensure that the procedures before GSCARC be

completed by 31 October 1997. While initially there were disagreements between the Administration and the Applicant concerning receivability by GSCARC of her appeal, the Applicant eventually submitted additional information in support of her appeal. GSCARC received her appeal, considered it on its merits, and recommended that the initial classification decision be maintained. The Applicant argues that she never received an official decision from the Assistant Secretary-General for OHRM concerning the classification. In addition, the Respondent did not produce his reply on the merits to the application until 9 July 1998, and then, only after receipt of an order by the Tribunal to do so.

IV. Taking into account that this case has been reviewed twice by GSCARC, that a long period of time has elapsed since the commencement of these procedures, that the Tribunal should ensure that no further procedural delays occur, the Tribunal will consider the facts of this case. The Tribunal notes that on 4 October 1996, the Respondent provided the Applicant with a copy of the points rating that governed the classified grade level assigned to her post, so as to allow her to submit the specific information required by GSCARC and thus to proceed with her appeal before GSCARC on the merits. Although, according to GSCARC, the Applicant conceded that the calculation of the points rating did not appear to support the upgrading of the post, the Applicant argued that the points rating did not reflect the knowledge required for the post.

V. The Tribunal has carefully considered the Applicant´s contention that she was not accorded due process during the appeals procedure regarding the classification of her post. The Tribunal notes that after apparent inaction by the Administration, the Respondent has remedied his initial failure to review the Applicant´s case on the merits. The Tribunal has consistently held that the Secretary-General has discretion in classification matters, and the

Tribunal will not substitute its judgement for that of the Secretary-General and the classification bodies in job classification matters. The Tribunal has determined that, after examination of the case by GSCARC, the Applicant has been accorded due process, and that there has been no improper exercise of the Secretary-General's discretion. (Cf. Judgements No. 396, Waldegrave (1987), No. 541, Ibarria (1991), No. 597, Colayco (1993), and No. 780, Maia-Sampaio (1996)).

VI. However, the Tribunal considers that the Applicant is entitled to compensation due to the inordinate delay of nearly three years, from the time she first attempted to have the classification of her post reviewed until the final decision by the Administration to maintain the classification level of her post at GS-4. Indeed, the Tribunal was required to intervene during the process to set a deadline for the Administration to conduct the required review. As the Tribunal has held in prior cases, "an inordinate delay 'not only adversely affects the administration of justice but on occasions can inflict unnecessary anxiety and suffering to an applicant.'" (Cf. Judgements No. 353, El-Bolkany (1985) and No. 414, Apete (1988)). Such is the case here. The Tribunal therefore assesses compensation for such delay in the amount of $3,000.

VII. For the foregoing reasons, the Tribunal:

1. Orders the Respondent to pay to the Applicant $3,000 as compensation for the Administration's delays in permitting the review of the classification of the Applicant's post to proceed.

2. Rejects all other pleas.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Vice-President

Victor YENYI OLUNGU
Member

Geneva, 7 August 1998

R. Maria VICIEN MILBURN
Executive Secretary